United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2052

B

P/S

To be argued by
MARGERY EVANS REIFLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. CARL BUFORD,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent-Appellee.

----------X

[ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. CARL BUFORD,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent-Appellee.

Docket No. 75-2052

[ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK]

BRIEF FOR RESPONDENT-APPELLEE

Questions Presented

1. Does petitioner state a claim against the State of New York when he has once been provided with a free trial transcript by the State, had not made a demand for another, and had not made any efforts to otherwise obtain a copy?

2. Did the District Court err in refusing to provide petitioner with a free trial transcript when petitioner failed

to show any need for its use in his federal habeas corpus proceeding?

3. Were petitioner's constitutional rights violated because he did not have a copy of his suppression hearing minutes?

Preliminary Statement

Petitioner appeals from an order of the United States District Court for the Southern District of New York (Knapp, J.), dated November 4, 1974, which denied petitioner's application for a writ of habeas corpus.

This Court granted a certificate of probable cause by order dated March 27, 1975 and directed the parties "to brief the correctness of the District Court's order of November 3, 1974, denying relator's motion for a trial transcript".

Statement of the Case

Petitioner is presently confined in Auburn Correctional Facility, Auburn, New York, pursuant to a judgment of conviction for the crime of murder in the second degree, rendered by the County Court, County of Rockland (Gallucci, J.) after a trial by jury. Petitioner was sentenced on June 18, 1968 to a term of imprisonment of twenty-five years to life.

A. Summary of State Proceedings

Petitioner was indicted for murder in the first degree by the Rockland County Grand Jury in connection with the death of his paramour, one Yvonne Dove (indictment number 67-118). Petitioner moved to suppress both oral statements and physical evidence. A hearing was held before the trial court and the motion was denied in a decision dated April 10, 1968.* Petitioner's trial commenced in May, 1968; the trial transcript is approximately 3000 pages long.

On appeal, the judgment of conviction was affirmed by the Appellate Division in a unanimous opinion. People v. Buford, 37 A D 2d 38 (2d Dept. 1971). Petitioner's brief on his state appeal averred that a copy of his trial transcript was furnished to his counsel without charge. See N.Y. Code Crim. Proc. § 456. (McKinney's Supp. 1970). Leave to appeal to the Court of Appeals was denied on September 28, 1971 (Burke, J.). The claims in petitioner's federal application which were exhausted were raised on the direct appeal.**

* That decision was submitted to the District Court by respondent as an exhibit to his affidavit in opposition. It is annexed hereto as Exhibit "A".

** Petitioner also had a state habeas corpus proceeding and coram nobis proceeding which were pursued through the Appellate Division, with counsel. Each application was denied. The issues raised therein were repetitive of the direct appeal or unrelated to this federal proceeding.

B. District Court Proceedings

Petitioner filed a pro se petition in the District Court, alleging seven claims for relief. These claims appear as broad topical headings;* accordingly, respondent sets forth these points according to the arguments made, not the captions:

Claim I

(a) Petitioner's fingernail scrapings should not have been admitted at trial because they were not taken or preserved in a proper manner and because it was not established that they connected petitioner to the victim's death;
(b) Petitioner's fingernail scrapings should not have been admitted at trial because petitioner had not received his Miranda warnings before they were taken;
(c) Other pieces of evidence (hair, teeth) should not have been admitted because they were not connected to petitioner or the victim; and
(d) The prosecution failed to prove the cause of death.

Claim II

Petitioner's guilt was not proved beyond a reasonable doubt; the evidence was insufficient to prove petitioner's guilt in a circumstantial evidence case.**

* Petitioner's points appear in the petition at 4, Appendix B to his brief.
** In this point petitioner may also be raising a claim of prejudicial publicity (Petition at 9). However, as the District Court found, this claim has never been raised in the state courts.

Claim III

Miranda warnings were hasty and lackadaisical; petitioner was hurriedly pressured into speaking; trial testimony does not show that petitioner understood and waived his rights.

Claim IV

Petitioner's rights were violated because he did not learn about a police report until trial.*

Claim V

The trial court erred in refusing to strike from evidence those pieces of evidence which were not connected to petitioner or the victim's death.

Claim VI

The trial court should have granted petitioner's motion to dismiss on the grounds that the prosecution failed to present a prima facie case.

Claim VII

The Appellate Division erred in deciding petitioner's direct appeal when certain photographic exhibits used at trial were missing and duplicates of certain others were substituted with his attorney's consent but without petitioner's permission.**

* The report contained information that an unknown person stated that John Sinclair committed the crime and that Mrs. MacMillan saw the victim drunk and bleeding in the afternoon and on the date of her death. The author of the report and Mrs. MacMillan were both witnesses at the trial. Petitioner had admitted to the police that he used the alias John St. Clair.

** The point is discussed at length in the Appellate Division's opinion. People v. Buford, 37 A D 2d at 40-42.

Along with the petition, petitioner filed a motion, pursuant to 28 U.S.C. §§ 2247, 2249, that certain documents be produced for the Court, not for himself. These included the indictment; the arraignment, Huntley, grand jury, trial, and sentencing minutes; his oral and written statements; any statements favorable to him; appellate briefs and opinion; and the medical examiner's report. Petitioner asked that these be produced for the Court by the Attorney General or Rockland County Attorney because he was indigent and could not afford to duplicate them. The motion was not acted upon nor were any of the documents produced at that time.

After respondent's opposition was filed,* petitioner applied to the District Court for an extension of time to file his traverse. Petitioner stated that he needed the adjournment because he did not have a transcript and moved, pursuant to

* Respondent annexed the decision of the trial court on the motion to suppress and the District Attorney's brief on appeal as exhibits. These were, of course, provided to petitioner as well as the Court.

28 U.S.C. § 2250, for a copy of the transcript.* His motions were referred to the Part I judge who on September 13, 1974, granted his application for an extension but denied his application for a transcript "at this time, without prejudice to renewal at a later time upon a greater showing of meritorious cause". (Werker, J.).

Petitioner then filed his traverse and renewed his § 2250 motion for the trial minutes, now adding that he wanted the grand jury and preliminary hearing minutes, the appellate briefs, and the autopsy reports. Petitioner mistakenly stated that respondent cited from all of these materials. In point of fact respondent referred only to portions of the trial transcript.** Petitioner's motion was denied by the District Court

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* 28 U.S.C. § 2250. Indigent petitioner entitled to documents without cost

"If on application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending."

** Respondent's opposition referred to fourteen pages of the 3000 page trial transcript. Because of the length of the transcript and the belief that its use was not necessary to the Court's determination (See Point I, post), it was not delivered to the courthouse. The opposition papers clearly stated that it would be delivered upon request. Accordingly, it was at least in constructive possession of the Clerk of the Court for the purposes of a § 2250 motion.

(Knapp, J.) on November 1, 1974. As a courtesy to the petitioner, the Attorney General's office had already sent him the fourteen pages of the trial transcript referred to in respondent's opposition.*

It appears that petitioner moved in the District Court for a certificate of probable cause to appeal from the denial of his motion for a trial transcript, as well as the denial of his application. Petitioner's stance suddenly changed and he charged that the state had violated his rights because it had not provided him with a trial transcript for the purposes of his federal habeas corpus appeal. Petitioner carefully failed to add that he had never made a demand on the state for his trial transcript.

Introductory Argument

On the record in this case, this Court need not make any general ruling on when an indigent state petitioner in a federal habeas corpus proceeding must be provided with a trial

* The covering letter to petitioner mentioned that the Attorney General's office could neither loan him the borrowed copy nor photostat it.

transcript, at the expense of the federal court (28 U.S.C. § 2250) or the convicting state. See Wade v. Wilson, 396 U.S. 282 (1970).* In the first place, petitioner has failed, even with the assistance of counsel in this Court, to show that he had any need for his suppression hearing minutes or trial transcript. Secondly, by not demanding, and obviously not having been refused a transcript by the state, petitioner has failed to allege any state action violating his rights. The same facts give rise to his failure to exhaust his state remedies before making the demand in federal court. 28 U.S.C. § 2254. Finally, petitioner, who has once already been provided with a free transcript by the state, has failed to make any efforts to obtain any of the copies of the transcript that were previously prepared.

* See generally Comment, The Indigent's Right to a Transcript of Record, 20 Kan. L. Rev. 745 (1972).

POINT I

PETITIONER, WHO WAS ALREADY PROVIDED WITH ONE FREE COPY OF HIS TRIAL TRANSCRIPT, FAILS TO STATE ANY CONSTITUTIONAL CLAIM AGAINST THE STATE OF NEW YORK SINCE HE HAS NOT MADE A DEMAND ON THE STATE FOR THE TRANSCRIPT NOR MADE ANY OTHER EFFORTS TO OBTAIN A COPY.

A. Petitioner has no claim against the State of New York because he has never requested and been denied a copy of his trial transcript by the state. He has also failed to exhaust his state remedies, as required by 28 U.S.C. § 2254.

By claiming that his rights to due process and equal protection have been denied and string-citing to fourteen Supreme Court cases involving state action (Petitioner's Brief at 12-13), petitioner is of course contending that the State of New York has violated his rights. U.S. Constit. Amend. XIV. § 1.

The obvious flaw in petitioner's argument is that there has been no action by the State of New York denying petitioner a transcript since he has not even made a demand on the state for a copy.* Petitioner's two motions requesting that he be

* As a courtesy to petitioner, a pro se litigant, the Attorney General's office sent him the fourteen pages of the transcript referred to in respondent's opposition, noting only that the Assistant could not lend out nor photostat her copy of the transcript. This letter was not made in response to a demand on her or respondent.

given a copy of his trial transcript were specifically made to the federal court under 28 U.S.C. § 2250. He therefore requested that the clerk of the federal court, not the State of New York, furnish him without cost with those parts of the record as may be required by federal court order. The record is bare of any suggestion that he has ever applied to the state courts or other state agencies or officials for his trial transcript.

An application to the state court must be made in order to satisfy the requirement that there be state action. In United States ex rel. Haines v. Patterson, 365 F. Supp. 839 (S.D.N.Y. 1973), an inmate sought a transcript to pursue collateral relief. Judge Frankel stated:

> "And if he is correct in his assertion to a right to the transcript, his suit must presumably rest upon an alleged infringement of that right, which presumably would have been accomplished by the state judicial system to which petitioner has not seen fit to apply." Id. at 840 (citations omitted).

Moreover, petitioner's request to the state courts must be made not only to satisfy the state action requirement but also to fulfill the exhaustion requirement. 28 U.S.C. § 2254. He may not bypass the state tribunals in his request

for a free transcript. United States ex rel. Haines v. Patterson, supra at 840. See also Wade v. Wilson, supra; Ellis v. State of Maine, 448 F. 2d 1325, 1327 (1st Cir. 1971); Chavez v. Sigler, 438 F. 2d 890, 894 (8th Cir. 1971); Snyder v. Nebraska, 435 F. 2d 679, 680 (8th Cir. 1970); Hines v. Baker, 422 F. 2d 1002, 1007 n. 11 (10th Cir. 1970).

Petitioner cannot evade this requirement by stating that he did not seek the transcript to prepare his collateral attack but to effectively pursue an already commenced proceeding. The fact remains that he has never gone to the New York courts with his claim. Petitioners who could adequately prepare their applications from prior state court briefs could avoid the exhaustion requirement by merely waiting until the respondent's opposition was filed to request the transcript. Any additional material or argument gleaned from the transcript could then be put into petitioner's traverse, or perhaps saved for a later application.

B. Petitioner has made no efforts to obtain previously transcribed copies of his trial transcript, precluding him from seeking federal relief.

In Wade v. Wilson, supra, an inmate sought a trial transcript in connection with state collateral proceedings. He had previously shared a copy with his codefendant for the

purpose of their direct appeal, and it has been retained by his codefendant. Thus, unlike petitioner, Wade had never even had his own free trial transcript. In addition, Wade had clearly exhausted his claim for a transcript in the state courts. Nonetheless, the Supreme Court refused to reach the merits of his claim, holding that he must first explore other avenues within the state (e.g. borrowing a copy, obtaining a state court order directing his codefendant or some other person to make a copy available). 396 U.S. at 286-87. Not only has petitioner never gone to the state courts with his request but also he has failed to make any efforts in his own behalf.

The cases decided since Wade are perfectly in accord with the principle that a free copy of a transcript (particularly when it is a second free copy) need not be provided to one who fails to exercise his own efforts to obtain a copy.* Ellis v. State of Maine, supra; Snyder v. Nebraska, supra; Hines v. Baker, supra; United States ex rel. Haines v. Patterson, supra.

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* Petitioner, for example, might contact his previous lawyers as well as the trial judge. See N.Y. Judic. Law § 299.

The requirement should especially be applied in the instant case. Petitioner was provided with a free trial transcript by the New York State in 1968. He makes no indication that he has done anything at all about locating that copy. The notion that the state or federal government should be constitutionally required to provide him with another before he has made judicial and extra-judicial efforts within the state is preposterous. Cf. Wade v. Wilson, supra at 288 (Black, J. dissenting).

POINT II

THE REFUSAL OF THE DISTRICT COURT TO PROVIDE PETITIONER WITH A COPY OF HIS TRIAL TRANSCRIPT DID NOT VIOLATE HIS CONSTITUTIONAL RIGHTS SINCE HE FAILED TO SHOW ANY NEED FOR THE TRANSCRIPT.

Petitioner, who sought a transcript only after respondent's opposition was filed, argues that it was required to "pursue effectively" his already commenced proceeding. This argument concedes the validity of the rule that a transcript need not be provided to an indigent who does not show a need for it. The federal courts have refused to require the state to provide an indigent with a transcript "for exploratory use" in collateral proceedings (Hines v. Baker, supra, at 1007) but rather have required that the demanding party demonstrate a "reasonably compelling" need for the transcript. Chavez v. Sigler, supra, at 894. See also, e.g., Jones v. Superintendent, Virginia State Farm, 460 F. 2d 150, 152-53 (4th Cir.), reh. den. 465 F.2d 1091 (1972), cert. den. 410 U.S. 944 (1973); Ellis v. State of Maine, supra, at 1327 (1st Cir. 1971); United States v. Shoaf, 341 F. 2d 832, 834-35 (4th Cir. 1964); United States v. Glass, 317 F. 2d 200, 202 (4th Cir. 1963); United States ex rel. Haines v. Patterson, supra, at 840; Harris v. State of Nebraska, 320 F. Supp. 100, 104-105 (D. Neb. 1970).

The requirement also pertains when a state or federal indigent demands a free transcript from the federal court, pursuant to 28 U.S.C. § 2250. Bozeman v. United States, 354 F. Supp. 1262, 1263 (E.D. Va. 1973); Cassidy v. United States, 304 F. Supp. 864, 867 (E.D. Mo. 1969), affd. 428 F. 2d 585 (8th Cir. 1970). See Irby v. Swenson, 361 F. Supp. 167 (E.D. Mo. 1973).

Having acknowledged the requirement that he show a need for his transcript, petitioner fails to satisfy the requirement. Under no view of the facts in this proceeding can it be found that petitioner "needed" his transcript to prepare his traverse.* Referring to the previous breakdown of petitioner's claims (ante at 4-5), it is obvious that Claims I(a) and (c) and V challenged evidentiary matters in the state court. It is

* Indeed, respondent did not need the transcript for his opposition either, as the following discussion reveals. Petitioner's constant reiteration that respondent used the transcript "extensively" is disingenuous. The opposition contained references to exactly fourteen pages involving only two of the seven claims.

settled beyond cavil that evidentiary matters are questions of state law, unreviewable in a federal habeas corpus proceeding. E.g. Buchalter v. New York, 319 U.S. 427, 430-31 (1943); United States ex rel. Sadowy v. Fay, 284 F. 2d 426, 427 (2d Cir. 1960); United States ex rel. Birch v. Fay, 190 F. Supp. 105, 107 (S.D. N.Y. 1961). Petitioner obviously could not have used the transcript with regard to these points; nor did respondent. When a claim regarding state evidentiary matters is made, the law is settled; resort to the transcript is unnecessary.*

The same rationale is true with regard to Claims I (d), II, and VI, all of which challenged the sufficiency of evidence addujed at trial. It is well established that the claim that a conviction was not supported by sufficient evidence "is essentially a question of state law and does not rise to federal constitutional dimensions" (e.g. United States ex rel. Terry v. Henderson, 462 F. 2d 1125, 1131 [2d Cir. 1972]; United States ex rel. Griffin v. Martin, 409 F. 2d 1300, 1302 [2d Cir. 1969]), absent a record so totally devoid of evidentiary support that a due process issued is raised. Garner v. Louisiana, 368 U.S. 157, 163 (1961); Thompson v. Louisville, 362 U.S. 199, 206 (1960).

* In Young v. Anderson, 513 F. 2d 969 (10th Cir. 1975), a state prisoner sought to have his trial transcript ordered in connection with a petition complaining about unconstitutional pretrial investigation. The Court of Appeals held that there was no error in refusing to order the transcript. Since there were no factual allegations which would give rise to any federal constitutional violations, it was unnecessary for even the District Court to examine the transcript. Id. at 972-73.

The Supreme Court has stated that the decision as to whether the charges were so devoid of evidentiary support as to raise a due process issue "turns not on the sufficiency of the evidence but on whether the conviction rests upon any evidence at all." Thompson v. Louisville, supra, at 199 (emphasis supplied).

In accordance with these principles, respondent's opposition set forth numerous pieces of evidence adduced in support of the murder charge. Since petitioner has never denied that these are in the record, and since they absolutely refute any claim that there was no evidence adduced, it would have been meaningless for petitioner to have his transcript. Once he failed to deny that this evidence was in the record, he could not possibly state a federal claim on the subject, with or without a transcript.*

Petitioner's Claim I (b) challenged the admission of his fingernail scrapings because they were taken before he received his Miranda warnings. Without conceding that this was the sequence of events, respondent argued that, in any event, petitioner had failed to state a violation of any constitutionally

* Since there was and could be no denial, respondent could have just as easily relied on the briefs on petitioner's direct appeal, rather than referring to pages of the actual transcript.

protected right. No reference was made to the transcript nor could resort to the transcript by petitioner or the Court have affected the outcome of this contention. The law on the subject is settled. Cupp v. Murphy, 412 U.S. 291 (1973); United States v. Wade, 388 U.S. 218 (1967); Schmerber v. California, 384 U.S. 757 (1966).

Petitioner's Claim IV alleged that a police report was withheld from him. See Brady v. Maryland, 373 U.S. 83 (1963). There was no suppression under Brady since the report was given to petitioner at trial. Moreover, the Mrs. MacMillan to whom the report refers testified at trial, as did the author of the report. Although the report referred to an unknown witness who identified the killer as John Sinclair, this was hardly favorable to petitioner under Brady, since he had admitted using the alias of John St. Clair.

Since petitioner conceded that he had the report at trial and did not deny that Mrs. MacMillan testified or that he

admitted using the alias John St. Clair, there was no necessity that the parties or the Court utilize the transcript.*

Finally, petitioner complained about the state appellate court's consideration of his appeal because certain exhibits were missing and others were duplicated. This allegation does not state a federal constitutional claim and was dealt with at length by the Appellate Division. People v. Buford, 37 A D 2d at 40-42. The claim does not in any event involve use of the trial transcript.

It is manifest from the above analysis that petitioner did not "need" his trial transcript to prepare his traverse. Were this not sufficient, equally telling is the fact that petitioner's counsel was given respondent's copy of the entire transcript to prepare his brief to this Court and is still unable to point to any necessity for the transcript.

* Accordingly, respondent's reference to the page in the transcript on which the admission of petitioner's alias occurred was hardly required.

POINT III

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BECAUSE HE WAS NOT GIVEN A COPY OF HIS SUPPRESSION MINUTES.

Petitioner's habeas corpus application also challenged oral statements admitted at trial, referring to "hasty and lackadaisical" Miranda warnings which he might not have understood (Petition at 11). After a suppression hearing, the trial court found that petitioner had received proper Miranda warnings and had waived his rights.* Respondent argued to the District Court that the finding of the trial court, which applied the correct standard of voluntariness, was entitled to a presumption of correctness. 28 U.S.C. § 2254(d); LaVallee v. Delle Rose, 410 U.S. 690 (1973). Respondent based his argument on the trial court's opinion since the suppression minutes were unavailable.**

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* The trial court's decision is annexed hereto as Exhibit "A".

** The facts regarding the minutes are as follows. Respondent's counsel subpeonaed both the suppression and trial minutes from the Rockland County Clerk. She received in response the trial transcript only. Further investigation through that office revealed that the suppression minutes had never been filed with the County Clerk. Because this issue was not litigated below, these facts are not in the record but will be documented upon request.

Petitioner has never alleged to any court that he did not receive a full and fair suppression hearing. He never specified to the District Court which of the eight exceptions to § 2254(d) arose in this case to overcome the presumption.* Nonetheless, respondent's opposition set forth the underlying supporting facts stated by the trial court.

None of petitioner's rights have been violated, and the District Court did not err in basing its decision on the trial court's decision after the suppression hearing. Section 2254(e) specifically states that the Court shall make its determination under the existing facts and circumstances if the record cannot be provided. The trial court's opinion was perfectly adequate for these purposes, especially because petitioner never raised any contention to overcome the presumption. Contrary to petitioner's suggestion (Petitioner's Brief at 17), he was not entitled to his munutes to "comb the record" to see if he could show that the hearing was not full and fair or that the finding was not supported by the record as a whole. See United States v. Shoaf, supra, at 833; cases cited ante at 15-16 .

* It is not suggested that he must have selected an exception by number but merely that he must allege some facts which could conceivably be construed as fitting one of the exceptions.

Petitioner was at his suppression hearing. The allegations in his eighteen page typewritten petition "indicate that he is quite familar with the details of his own case." See Schaffer v. Swenson, 318 F. Supp. 51, 55 (E.D. Mo. 1970), cert. den. 404 U.S. 944 (1971). Petitioner has had a direct appeal and two state postconviction proceedings, pursued through appeal, all with counsel. Surely if fundamental fairness had been violated in connection with his conviction, it would have been raised by now. Cf. Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974), Fay v. Noia, 372 U.S. 391, 401-402 (1963).

More telling, of course, is the fact that petitioner's counsel in this Court borrowed the 3,000 page trial transcript from the Attorney General's Office before filing his brief. Surely if there were any evidence favorable to petitioner which he believes might also have been before the suppression court, this Court would have been informed. No such facts are alleged. Petitioner's continued insistence that he is entitled to his suppression minutes is frivolous.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: New York, New York
July 1, 1975

Respectfully submitted,

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EXHIBIT "A"

COUNTY COURT : COUNTY OF ROCKLAND

= x

THE PEOPLE OF THE STATE OF NEW YORK

- against - DECISION

CARL BUFORD,

Defendant.

= x

Before:

HON. JOHN A. GALLUCCI,

County Judge.

Appearances:

Hon. Robert R. Meehan, District Attorney of Rockland County, for the People,

Hon. Arnold Becker, Public Defender of Rockland County, for the Defendant,

Defendant in person.

This is a motion by the defendant for an order suppressing the use in evidence of oral statements allegedly given to law enforcement officers (Miranda v. Arizona, 384 U.S. 436; Code of Criminal Procedure 813-f, et seq.). A hearing has been held immediately before trial.

The defendant has also made a motion by order to show cause for an order to suppress the use in evidence against the defendant of Grand Jury Exhibit 13 (shirt), Grand Jury Exhibit 19 (buttons), Grand Jury Exhibits 21 and 22 (photographs of defendant's hands), Grand Jury Exhibit 23 (matter substance removed from defendant's upper left arm), Grand Jury Exhibits 24A and 24B (fingernail scrapings removed from underneath defendant's fingernails), and all portions of Grand Jury Exhibit 26 (State Police Laboratory Report) relating to any and all of the above, together with all other personal property or matter sought to be introduced on the trial on the ground that there was an illegal arrest, illegal search and seizure, and that the same were also obtained as the result of an illegal waiver of right to counsel by the defendant.

No hearing was held on the application of the defendant to suppress the physical evidence set forth in the above paragraph. The defendant and the District Attorney stipulated that the testimony taken at the preliminary hearing on September 14, 1967, the Grand Jury minutes and the testimony taken at the hearing held on defendant's application for an order suppressing the use in evidence of oral statements allegedly given by the defendant to law enforcement officers would constitute the testimony and evidence on which the Court could make its determination of defendant's application to suppress the physical evidence hereinabove referred to.

The following constitutes the Court's findings of fact and conclusions of law with respect to both applications:

A short time after 11:30 P.M. on August 26, 1967, Patrolman Ralph Krassow of the Village of Spring Valley Police Department, while he was on desk duty, received a phone call. A male voice asked if the Police Department had checked at 52 First Avenue to see if anything was wrong. The patrolman asked who is this, and the male voice said, "I won't tell you". The patrolman then said, "I know it's you, Carl Buford". The male voice then stated he was calling from New Jersey. Patrolman Krassow testified that he identified the voice as that of the defendant, Carl Buford, since he had spoken to the defendant twice, although not on the telephone, prior to August 26, 1967.

The Court is of the opinion that the People have proven beyond a reasonable doubt that the defendant did telephone the Spring Valley Police Department and that the conversation set forth above took place.

The Court holds that the statements made by the defendant to Patrolman Krassow on the telephone are admissible in evidence. (Miranda v. Arizona, 384 U.S. 436). The language in Miranda supports such a holding. The Supreme Court stated, "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime,

or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today". (Miranda v. Arizona, supra at 478).

The statements made over the telephone were volunteered statements. The defendant was neither in custody nor deprived of his freedom and, therefore, the police were not required to advise him of his constitutional rights. The statements are admissible at the trial.

After receiving the telephone call, Patrolman Krassow accompanied by Sergeant Chous, on instructions from their superior officers, picked up the defendant at about 1:40 A.M. on a public street. He was placed in the police car and taken to the police station. From the moment he was picked up, he was in custody and not free to go and, in the opinion of the Court, the defendant was effectively under arrest.

A short time after his arrival at the police station and at about 2:10 A.M., interrogation of the defendant by Investigator McElroy of the District Attorney's Office was commenced. The defendant now seeks to suppress the statements which he gave to Investigator McElroy.

At the time the defendant made oral statements to Investigator McElroy, the defendant was in custody and this imposed a duty upon the police to warn the defendant of his constitutional rights. (Miranda v. Arizona, supra).

Investigator McElroy testified that the first thing he did before interrogating the defendant was to inform the defendant that he wanted to question him about an assault upon Yvonne Dove. (Yvonne Dove was the victim of the homicide with which the defendant is charged and was the paramour of the defendant.) Thereupon and before any interrogation took place, he read to the defendant from a card prepared by the District Attorney's Office, the Miranda warnings as follows:

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, the Public Defender or an assigned lawyer will be called immediately to represent you at no cost to you before any questioning, if you wish to have him.

He asked the defendant if he understood what had just been read to him and the defendant said he did. He was then asked if he wanted a lawyer and the defendant replied that he didn't want an attorney and didn't think he needed one. The defendant then asked for a card which contained the above four warnings. Investigator McElroy asked the defendant if he could read and the defendant replied in the affirmative. Investigator McElroy placed his initials, the date and time on a card and gave it to the defendant. The defendant read it, said he understood it and placed it in his pocket.

Investigator McElroy further testified that when he began questioning the defendant, the defendant appeared to have been drinking but was not intoxicated. During the questioning the defendant's speech was clear and coherent and the defendant was talkative. The questioning was carried on in a normal voice and the defendant appeared nervous and excited. The questioning continued until about 6:10 A.M. when the defendant, in the opinion of the investigator, got surly and indignant and asked for a lawyer. Thereupon, the questioning was stopped and a lawyer was called. During the interrogation between 2:10 A.M. and 6:10 A.M., the defendant was offered food and drink which he refused and he was also asked many times if he wanted a lawyer and the defendant replied in the negative until he asked for a lawyer at about 6:10 a.m.

There was further testimony by Investigator McElroy supported by other witnesses, that the defendant was not tricked or threatened, nor were any promises made to him by anyone.

Based upon the above findings of fact, this Court concludes that the People have proven beyond a reasonable doubt that Investigator McElroy did advise the defendant of his constitutional rights, i.e. that he had a right to remain silent; that anything he did say could be used against him in a court of law; that he had a right to have counsel present during questioning; and if he could not afford counsel, the public defender would be called to represent him without cost.

The only other question to be considered is whether or not the People have proven beyond a reasonable doubt that the defendant intelligently, knowingly, and voluntarily waived his rights. This Court concludes that the People have met the "heavy burden" of proving a waiver. (Johnson v. Zerbst, 304 U.S. 458).

The evidence establishes that the defendant understood the warnings, waived his constitutional rights, and willingly, voluntarily, intelligently and knowingly submitted to the questioning.

There is no evidence that the police threatened, coerced or made promises to the defendant to induce him to answer their questions.

As stated above, based upon the testimony and surrounding circumstances, the Court concludes that the People have proven beyond a reasonable doubt that the defendant intelligently, knowingly and voluntarily waived his constitutional rights. Consequently, the statements given by the defendant to Investigator McElroy from 2:10 A.M. to about 6:10 A.M. on August 27, 1967, are admissible in evidence.

During the time that the defendant was being interrogated by Investigator McElroy on August 27, 1967, between 2:10 A.M. and about 6:10 A.M., the defendant's clothing was removed from his body, including his navy blue socks which appeared to have blood stains upon them. The police also examined his body for cuts and bruises and at about 3:00 A.M., scrapings were taken from underneath his fingernails, and a substance that looked like blood was removed from his upper left arm.

The defendant now also moves for an order to suppress the use in evidence of Grand Jury Exhibit 13 (shirt), Grand Jury Exhibit 19 (buttons), Grand Jury Exhibits 21 and 22 (photographs of defendant's hands), Grand Jury Exhibit 23 (matter substance removed from defendant's upper left arm), Grand Jury Exhibits 24A and 24B (fingernail scrapings removed from underneath defendant's fingernails), and all portions of Grand Jury Exhibit 26 (State Police Laboratory Report) relating to any of the above, together with all other personal property or matter sought to be introduced on the trial on the ground that there was an illegal arrest, search and seizure, and that the same were also obtained as the result of an illegal waiver of right to counsel by the defendant.

The defendant contends that he was placed under arrest by Patrolman Krassow at about 1:45 A.M. when he was placed in the police car and that his arrest was illegal because there was no compliance by Partrolman Krassow or any other police officer with the requirement of Section 180 of the Code of Criminal Procedure that when arresting a person without a warrant, the officer must inform the arrested person of the cause of the arrest. The defendant claims that he was not told by any of the police officers the reason for his arrest and detention either at the time he was placed in the police car or subsequently when he was being questioned by Investigator McElroy at the police station and, therefore, his arrest was illegal, the questioning was illegal, and the removal of the substance from his left shoulder, the scrapings from his fingernails and his socks was an illegal search and seizure.

This Court finds that defendant was arrested when he was placed in the police car at which time he was informed by Patrolman Krassow that he was a suspect (See page 226 of Preliminary Hearing held on September 14, 1967) and that he was under arrest for suspicion of homicide of Yvonne Dove (See page 241 of Preliminary Hearing held on September 14, 1967). In addition, at the police station before he was interrogated by Investigator McElroy, he was told by Investigator McElroy that he wanted to

question him about an assault on Yvonne Dove.

This Court further finds that even though the defendant was not explicitly told of the cause of his arrest and detention, the arrest and detention were legal. (People v. Coffey, 12 N.Y.2d 443). The defendant must have known why he was placed in the police car, taken to the police station and questioned.

The Court of Appeals stated in People v. Coffey, supra, at page 453, "We need not now announce that failure of an arresting officer to inform as to the cause will never make an arrest illegal (see discussions in People v. Cahan, 44 Cal.2d 434 on page 442; in State v. Smith, 37 N.J. 481, 491, and in Squadrito v. Griebsch, 1 N.Y.2d 471, 479, supra). It is enough in this case to hold that on the whole picture Coffey had for our present purposes sufficient notice as to the cause of his capture and detention . . . . " As in People v. Coffey, supra, in the instant case, the defendant had "sufficient notice" as to the cause of his arrest and detention.

This Court having concluded that the defendant was legally arrested and detained and also that he waived his constitutional rights with respect to the statements made by him to Investigator McElroy between 2:10 A.M. to about 6:10 A.M. on August 27, 1967, the only question that remains is whether the items of physical evidence sought to be suppressed were obtained in violation of defendant's constitutional rights under the Fifth Amendment (privilege against self-incrimination) and the Sixth Amendment (right to counsel).

The Court finds, as stated above, that the defendant waived his right to counsel, and also finds that there was no violation of the defendant's Fifth Amendment rights. (Schmerber v. California, 384 U.S. 357, U.S. v. Wade, 35 U.S.L.W. 4597).

In Schmerber v. California, supra, at page 761, the Court stated that the privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testi-

monial or communicative nature," and the Court held that compelling a suspect to submit to a withdrawal of his blood for analysis for alcohol content and the admission in evidence of the analysis report was not compulsion to those ends. In U.S. v. Wade, supra, at page 4598, the Court said, "We held in Schmerber, supra, at page 761, that the distinction to be drawn under the Fifth Amendment privilege against self-incrimination is one between an accused's 'communications' in whatever form, vocal or physical, and 'compulsion' which makes a suspect or accused the source of 'real or physical evidence'". Schmerber, supra, at page 764, we recognized that "both federal and state courts have usually held . . . . [the privilege] offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."

The U. S. Court of Appeals, 8th Cir., in Weaver v. U.S., decided July 10, 1967, New York Law Journal, October 31, 1967, and the U. S. Court of Appeals, District of Columbia, Lewis v. U. S., decided July 5, 1967, New York Law Journal, September 7, 1967, both held that compelling an accused to make a sample of his handwriting does not fall within the privilege against self-incrimination.

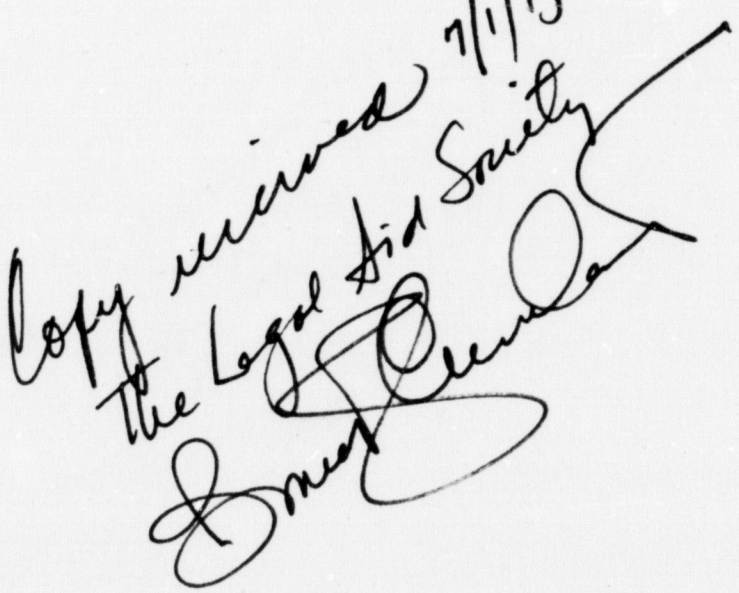
Having decided that the defendant was legally arrested and detained, and that he waived his constitutional rights under Miranda v. U. S., supra, and that his rights under the Fifth Amendment were not violated, the defendant's motion to suppress the physical evidence is in all respects denied.

Ordered that there be no publication of this decision, or any part thereof, prior to the case being submitted to the jury or until the indictment is otherwise disposed of.

Submit order.

Dated: New City, New York
April 10th, 1968

John A. DeStefano
County Judge, Rockland County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